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6 DOMESTIC VIOLENCE TASK FORCE VIRTUAL MEETING

7 January 12, 2022

8 Held via Webex

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11 PRESENT:

12 Hon. Anna Barbara Hantz Marconi,

13 Associate Justice, New Hampshire Supreme Court

14 Hon. Susan Carbon, Circuit Court Judge

15 Hon. Diane Nicolosi, Superior Court Judge

16 Hon. John Yazinski, Circuit Court Judge

17 Mary Barton, Clerk, Circuit Court

18 Merrill Beauchamp, Director, Victim &

19 Witness Program

20 Kathy Beebe, Executive Director, Haven NH

21 Kristyn Bernier, Investigator, Belknap

22 County Attorney's Office

23 Steven Endres, Assistant County Attorney,

24 Merrimack County

25 Martha Ann Hornick, Grafton County



1 Attorney

2 Mary Krueger, Attorney, NHLA

3 Lynda Ruel, Director, Office of

4 Victim/Witness Assistance, NH DOJ

5 Scott Hampton, Director, Ending the

6 Violence

7 David Hobbs, Hampton, NH Association of

8 Chiefs of Police

9 Lyn Schollett, Executive Director, New
10 Hampshire Coalition

11 Amanda Grady Sexton, Director of Public
12 Affairs, New Hampshire Coalition

13 Jon Strasburger, New Hampshire
14 Association of Criminal Defense Attorneys

15 David Vicinanzo, Attorney, DOVE Program

16 Patricia LaFrance, Attorney, The Black
17 Law Group

18 Betsy Paine, Attorney, CASA NH

19 Pam Dodge, NHBA DOVE Program & 603 Legal

20 Sarah Freeman, Circuit Court

21 Administrator

22 Jean Kilham, Manager, NHJB Domestic
23 Violence Program

24 Erin Jasina, Director, NHLA DV Program

25 Anne Zinkin, Supervisory Law Clerk, NHSC



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1 JUSTICE HANTZ MARCONI: Okay.

2 Welcome to our second task force meeting
3 on the review of domestic violence cases
4 in the judicial system. Today's meeting
5 focuses on charge 2, which is a review of
6 the current status of New Hampshire law
7 regarding domestic abuse.

8 And included in this are tangential
9 statutes and remedies that are within our
10 purview to consider. Yes, are within our
11 purview to consider.

12 So we have posted the documents that
13 have been shared with the task force,
14 various domestic violence law relevant
15 cases, civil stalking law relevant cases,
16 nonprecedential substantive domestic
17 violence orders, nonprecedential
18 substantive civil stalking orders -- what
19 was circulated did not include some
20 procedural cases -- federal statutes, the
21 ATF criteria, and some comments that have
22 been submitted.

23 And as we did yesterday, we will
24 walk through the various areas, get input
25 from our various members, stakeholders,



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1 and then figure out what we are going to
2 be uploading for public comment.

3 As you know, some of the -- we have
4 some constraints in terms of orders, and
5 we'll get to that in another charge,
6 given what can be posted and what can't
7 be. So we'll have to be intentional
8 about what we share at this stage of the
9 process.

10 And we have -- just so you know,
11 from yesterday's meeting, we are in the
12 process of developing kind of minutes, if
13 you will, not really minutes as much as a
14 summary of the discussion points so that
15 we've captured them so that we can refer
16 back as we move forward in the task force
17 recommendation-drafting process.

18 So I will open the floor for
19 comments on the primary domestic violence
20 statute, 173-B. And I have just included
21 four talking points. And Jean Kilham has
22 been very helpful adding some context
23 that it might be helpful if those who
24 have been involved in past or current
25 legislative initiatives would speak up.



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1 A focus or a discussion about the
2 definition, as it exists today, of what
3 constitutes domestic violence, other
4 types of -- other types of behavior --
5 let me call it concerning behavior that
6 perhaps should be, could be addressed,
7 and factors in the -- under the current
8 rubric, factors that the court should be
9 aware of, considering, assessing in cases
10 as they're brought today.

11 Understanding that when we talk
12 about the statute and its interpretation,
13 some of that belongs in a -- well,
14 changes to the statute would belong in a
15 different branch of government, with the
16 ability to investigate, review, weigh
17 policy considerations that we have three
18 branches of government, and ours is to
19 interpret, not to make the law, so -- but
20 this task force obviously bleeds over
21 into other areas.

22 And I think it is well within our
23 charge to be thinking of recommendations
24 that may not be within the branch's
25 purview but may be a ball that can be



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1 picked up and carried by a different
2 branch of government.

3 So with that, I open the floor to
4 our domestic violence statute. And
5 frankly, I don't care if we go in order.
6 If we want to talk about civil stalking
7 statute at the same time, divorce orders,
8 these things all tend to interrelate.

9 And we also do have a representative
10 of the Superior Court, though not to
11 cabin (ph.) the discussion, but the
12 Superior Court representative is part of
13 the task force because we know there is
14 interaction between the Circuit Court and
15 Superior Court cases.

16 So jump in as you will.

17 MS. LAFRANCE: So this is Patty
18 (ph.) LaFrance. I just want to expand a
19 little bit on what Jean had put in her
20 outline regarding financial abuse because
21 that obviously comes up a lot in the
22 cases I have, in terms of either
23 parenting cases or even divorce cases.

24 Obviously, when a divorce petition
25 is filed, there is some restraint because



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1 of the anti-hypothecation order that the
2 courts send out as routine when
3 something's first filed. But I see it a
4 lot, where people come to me; their
5 finances are controlled.

6 I can't tell you how many people
7 call my office, and we ask them how much
8 their partner makes or the father of
9 their child or the mother of their child
10 or their husband, and they say, I don't
11 know; they control the finances.

12 I guess the problem is would it rise
13 to the level of needing some type of
14 protection? I welcome input on this
15 because would it raise issues of due
16 process of depriving somebody? I mean,
17 what if it's a person who it's -- they
18 came into a marriage with X amount of
19 money? I don't know. I welcome thought
20 on that. But definitely, we do see
21 financial abuse.

22 And the other area that I wanted to
23 bring up, especially in light of what's
24 happened in the past two years with
25 COVID, is exposure to disease, illness.



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1 In the old days, it was STDs, right? But
2 now it's -- I have clients that have been
3 exposed by their partners because of
4 their -- whatever -- beliefs. Obviously,
5 relate to any other type of behavior that
6 would expose somebody to a potentially
7 deadly disease. Those are the two areas
8 that I see.

9 JUSTICE HANTZ MARCONI: Interesting.
10 You're right. There is a health
11 component as well. Always has been, but
12 now it's a little different.

13 MS. JASINA: This is Erin Jasina
14 with New Hampshire Legal Assistance. I
15 would say one of the most difficult
16 things that we see when we're working
17 with victims and survivors is that they
18 come to us wanting a protective order.
19 We review the statute with them.

20 And what we're seeing is abuse.
21 It's emotional, psychological abuse, but
22 it doesn't fit within the parameters of
23 173-B. And that's really challenging to
24 acknowledge that the abuse has occurred,
25 but under our law, you can't be



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1 protected. So I'm open to expanding or
2 thinking about expanding the definition
3 of abuse in New Hampshire.

4 DR. HAMPTON: I would just like --
5 this is Scott Hampton.

6 JUSTICE HANTZ MARCONI: Okay.

7 DR. HAMPTON: I would like to
8 piggyback on what Erin was saying, just
9 from the flip side. When I work with
10 offenders in the batterers' intervention
11 programs, one of the frequent
12 conversations we get involved in this is
13 we'll have people tell us, well, the one
14 form of abuse that I'm likely to give up
15 or to forgo is the physical abuse.

16 And I'm always curious about that
17 because it seems to be fairly effective
18 in what they're trying to accomplish.
19 And they said, well, the physical abuse
20 is what actually gets me caught. And
21 there'll be a discussion in the group
22 amongst the men about the various forms
23 of abuse that actually cross a legal
24 line.

25 And what they're looking for is a



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1 way to control their partners in a way
2 that navigates the legal system
3 effectively. So I think looking more
4 broadly, in terms of what Evan Stark
5 refers to as coercive control, might
6 indeed expand, probably substantially,
7 what we have covered under 173-B, in
8 terms of forms of abuse.

9 The other piece I would throw out
10 with that too is when we're thinking
11 about credible threat and we're looking
12 about the level of dangerousness, some of
13 the forms of dangerousness that are
14 presented by abusers have nothing to do
15 with abuse. So it's either abusive
16 actions that are not illegal, or they're
17 factors that load on dangerousness that
18 are not abuse in and of themselves.

19 And so if there's a way for us to be
20 able to think about credible threat in a
21 somewhat more expansive way, say, no,
22 this situation poses a danger, even
23 though it's these factors, whether it's
24 looking at unemployment, or does the --
25 one of the factors is does the person



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1 know that you have children that are not
2 his. Well, that's not abusive, but it is
3 one of the factors.

4 So if we could tie things into
5 various dangerousness assessment tools,
6 such as the ones that Jackie Campbell
7 has, whether it's the lethality
8 assessment protocol, or more broadly, the
9 dangerous assessment tool -- and there
10 are many others out there as well -- I'd
11 like us to do that.

12 JUSTICE HANTZ MARCONI: So following
13 up on that, because this is -- there is
14 an assessment, and then there is the
15 result, if you will, of a finding of
16 domestic abuse. So how, along the
17 continuum, if you've thought about it,
18 which I assume this group has or many
19 have, how do you proceed along that
20 continuum where you have an assessment
21 factor, one, the partner has children
22 that are not of -- that are not the same
23 as the other partner, not of theirs, so
24 children with a different parent?

25 That may be a dangerousness factor,



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1 but does that -- how would the court, if
2 you will, analyze that in the context of
3 the resulting impact of a DV order in the
4 system with certain, again, impacts and
5 due process considerations for the person
6 restrained?

7 DR. HAMPTON: Right.

8 JUSTICE HANTZ MARCONI: And so the
9 same thing, financial control again, we
10 have a financial exploitation statute
11 which requires certain levels of proof.
12 And that is what I find complicating,
13 when you try to put these factors into
14 the DV procedure the way it is now, or
15 are we talking about different types of
16 statutory remedies?

17 DR. HAMPTON: Um-hum.

18 JUDGE YAZINSKI: There's
19 intersection between RSA 173-B, domestic
20 violence, and parenting cases that we see
21 and divorce cases that we see. The
22 difficulty with -- that I have as a judge
23 and I think all Circuit Court judges have
24 when hearing domestic violence petitions,
25 domestic violence cases, are the issues



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1 that you've already identified.

2 We recognize that financial control
3 is a form of abuse. I hear the most
4 heart-wrenching testimony about verbal
5 abuse that you could imagine. It's
6 painful to hear what petitioners undergo
7 on a regular basis. But absent -- and
8 you've -- everyone has pointed this out.
9 Absent being able to check one of those
10 boxes under 173-B:1, we can't -- we
11 really can't consider it.

12 And that is -- in my mind, the first
13 step is to get a broader understanding of
14 what domestic partner abuse looks like;
15 have those who make the laws understand
16 that it is part and parcel of lethality,
17 going down the road. It's part and
18 parcel of damage to children. But it
19 isn't part of 173-B.

20 But when we're hearing a divorce
21 case or a parenting case and we are
22 cognizant of the forms of domestic abuse
23 that don't exist in the statute, we do
24 formulate orders that incorporate
25 restrictions on abusers and requirements



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1 on abusers that are part of a parenting
2 decree, part of a divorce decree. But
3 it's hard to do it under 173-B without
4 the definitional changes.

5 JUSTICE HANTZ MARCONI: And those
6 orders, in parenting and family cases --
7 correct me if I'm wrong -- don't go into
8 the registry and don't have the same
9 ramifications. And so that informs, I
10 think, some of the limitations, if you
11 will.

12 JUDGE YAZINSKI: Exactly.

13 JUSTICE HANTZ MARCONI: And so
14 there, you have options, in parenting and
15 divorce cases, to control some of this
16 behavior. That leaves out the childless,
17 nonmarried, or nondivorcing, if you will,
18 couple.

19 So that's where, I think, it's
20 interesting and some interesting ideas.
21 That's where your civil stalking --
22 financial exploitation now gets geared to
23 elderly financial exploitation. Don't
24 know that -- I don't know of any -- maybe
25 some of -- again, some of you in the



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1 field, so to speak, know of other states
2 that might have tried sort of emotional
3 abuse, criminalizing that kind of
4 conduct. So I would like to hear about
5 that if we've got some input.

6 MR. ENDRES: Steven Endres. I don't
7 have input on that. But I do think it's
8 important to recognize that a lot of the
9 language in 173-B and 631:2-b seems to be
10 based on federal law regarding possession
11 of firearms in 18 U.S.C. 922.

12 And a lot of those definitions may
13 be somewhat locked in to what the federal
14 statutes are currently using. So
15 although you can have a crime of
16 emotional abuse or financial abuse in New
17 Hampshire, that wouldn't have the same
18 ramifications with a conviction
19 preventing someone from possessing
20 firearms or purchasing firearms in the
21 future.

22 MR. VICINANZO: This is Dave (ph.)
23 Vicinanzo. Steve, just to follow up on
24 that, I think that's an excellent point.
25 I have had a similar thought. That



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1 language from the federal criminal code,
2 which I have particular familiarity
3 with -- I was in the U.S. Attorney's
4 Office for many years -- is at least
5 thirty years old.

6 And in reading the definition of
7 abuse and the standards for obtaining
8 temporary relief or even permanent
9 relief, I am struck by the sense that the
10 statute fails to -- it's about fifteen
11 years behind what our understanding or
12 the medical community's understanding of
13 trauma and the effects of trauma are on a
14 victim.

15 And I really feel like it's overdue
16 for an overhaul. It really reflects
17 1980s, 1990s approach to these things.
18 And the idea, for instance, in the Tosta
19 decision that a woman who was abused nine
20 months earlier, and it took nine months
21 for her after the abuse, after the
22 qualifying predicates to have occurred,
23 before she actually sought an order, was
24 told that it's -- you're too late. The
25 fact that you were assaulted by your



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1 husband nine months ago, sorry, you're
2 out of luck.

3 I mean, it just flies in the face,
4 with our modern understanding of how,
5 neurologically, trauma works on a brain
6 and how domestic violence works on a
7 victim. I really feel like the
8 legislature needs to take a serious look
9 and really overhaul the definition of
10 abuse and the requirements for the state
11 to recognize it and to interpose legal
12 protection.

13 MS. SEXTON: This is Amanda Grady
14 Sexton. I just wanted to note that the
15 U.S. Senate is likely going to introduce
16 their version of the Violence Against
17 Women Act sometime by the end of this
18 month, which we expect to see some
19 amendments to that law, including at
20 least a partial closure of the boyfriend
21 loophole, et cetera. So there will be
22 some changes relative to those laws soon.

23 JUSTICE HANTZ MARCONI: Amanda, is
24 the --

25 MS. FREEMAN: This is Sarah Freeman.



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1 To add to one additional point, the
2 orders of protection, the 173-B and
3 stalking orders of protection are entered
4 into the law enforcement database as
5 Brady-qualifying, based upon 18 U.S.C.
6 922(g), which talks about protective
7 orders and not qualifying crimes of
8 misdemeanor domestic violence.

9 So they're very similar statutes,
10 but our protective orders go into the
11 system based upon that other part of the
12 statute.

13 JUSTICE HANTZ MARCONI: And the
14 impact of that going into the system
15 versus -- I know this is something Jean
16 brought up -- those that don't, they have
17 a national scope, if you will. They are
18 more restrictive of future conduct on the
19 abuser than, perhaps, a civil restraining
20 order in a divorce or parenting case,
21 which is enforced, what, by the courts.

22 MR. ENDRES: Well, if it gets put
23 into the system, if you do go to purchase
24 a firearm, they do what's called a NICS
25 check, and it would come up on a NICS



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1 check that you're disqualified. And
2 presumably, you would be denied the sale
3 of that firearm --

4 JUSTICE HANTZ MARCONI: Right. But
5 it's meant --

6 MR. ENDRES: -- whereas in --

7 JUSTICE HANTZ MARCONI: -- to
8 protect -- I guess I'm moving off the
9 firearms. But in terms of -- that's one
10 aspect of protection of victims. In
11 terms of the restraint on other behavior,
12 filing it in the registry creates a more
13 immediate enforcement tool?

14 MR. ENDRES: It would create a
15 notification to law enforcement.

16 JUSTICE HANTZ MARCONI: Okay.

17 MS. FREEMAN: It means that orders
18 of protection are immediately visible to
19 law enforcement across the country, upon
20 running someone's name and date of birth.
21 It also would show up in a NICS
22 background check. But for law
23 enforcement purposes, anyone, rather --
24 if they're Massachusetts or New Hampshire
25 or California know that these orders



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1 exist and are active, whereas a parenting
2 or marital restraining order, those are
3 not instantly available across the
4 country and may not be enforceable and
5 entitled to full faith and credit between
6 the states.

7 JUSTICE HANTZ MARCONI: Right.
8 Right. And then in terms of background
9 check, that then impacts anything that
10 the abuser would do, apply for, whatever,
11 that requires background check, right?

12 MS. FREEMAN: Yes.

13 JUSTICE HANTZ MARCONI: Yeah. And
14 Amanda, I'm curious. Are the amendments
15 to the Violence Against Women Act
16 addressing any definitional-type issues
17 that we've been talking about?

18 MS. SEXTON: It may, yes. So the
19 House version, the U.S. -- from U.S.
20 Congress had some definitional changes,
21 so the Senate version is expected to have
22 some as well.

23 JUSTICE HANTZ MARCONI: And this is
24 strictly --

25 MS. SEXTON: The one thing -- yes.



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1 JUSTICE HANTZ MARCONI: Go ahead.

2 MS. SEXTON: I'm so sorry. Yes. So
3 that's federal law.

4 JUSTICE HANTZ MARCONI: Right.

5 MS. SEXTON: And I think one thing
6 that I did want to note that seems to be
7 a bit of a difference between New
8 Hampshire statutes and some of our --
9 some of the other states are ensuring or
10 moving towards some sort of mechanism for
11 enforcement when firearms have been
12 relinquished.

13 So right now, that's sort of a --
14 not something that we're doing in New
15 Hampshire. That's not something that our
16 statute directs us to do is to ensure
17 that there has been relinquishment of
18 those firearms.

19 JUSTICE HANTZ MARCONI: Sort of a
20 second check, if you will?

21 MS. SEXTON: Right. So it's sort of
22 an honor system right now, which is not
23 always honored, as you might imagine.

24 JUSTICE HANTZ MARCONI: Is that
25 other people's experience?



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1 MR. STRASBURGER: And this is Jon
2 Strasburger. That's been something I see
3 routinely in my divorce cases that also
4 have a domestic violence petition
5 component is there's often a question as
6 to whether or not -- despite the
7 existence of the temporary order of
8 protection requiring the relinquishment
9 of firearms, whether or not all the
10 firearms have really been relinquished.

11 It routinely seems to get raised,
12 after the orders get issued, as to
13 whether or not there may be other
14 firearms in existence.

15 And that tends to be a little bit of
16 a he said, she said battle about whether
17 the petitioner has a recollection of how
18 many firearms were in the home versus
19 what the police found at the time they
20 served the temporary orders of
21 protection. So that's something that
22 comes up and is, I would say, a frequent
23 area of dispute.

24 I just wanted to follow up quickly
25 on sort of the difference between an RSA



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1 458:16 restraining order and a 173-B
2 domestic violence petition.

3 I think it's a -- I think it's a
4 common misunderstanding. I think a lot
5 of family law practitioners have the
6 mistaken belief that it's just really a
7 contempt issue for violation of a 458:16
8 restraining order or a 461-A restraining
9 order in the context of a parenting case.

10 And that's not really true. I think
11 it's not used very often, but the
12 statute, 458:16 specifically, in
13 paragraph 3, authorizes an immediate
14 referral to law enforcement and a twelve-
15 hour hold for arrest of a party that
16 violates even a 458:16 restraining order.

17 So although, yes, it's true that
18 those orders aren't entered into the
19 national database, which is a significant
20 difference and I think most of us would
21 agree on that, I just wanted to make sure
22 that people are aware that the statute
23 does authorize law enforcement
24 enforcement of even a 458:16 restraining
25 order and a twelve-hour hold with arrest



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1 without a warrant, and a referral for
2 prosecution.

3 I do note that it's interesting that
4 the language of the statute says that if
5 the order is broken by committing an
6 assault, a criminal trespass, criminal
7 mischief, stalking, or other criminal
8 act, then the party's guilty of a
9 misdemeanor, and peace officers shall
10 arrest the party.

11 So it's a little bit odd that it --
12 the statute doesn't refer to just a
13 general violation of that protective
14 order. So if the court were to issue a
15 458:16 order that says neither party
16 shall contact the other, sounds like that
17 is not a violation that would be subject
18 to immediate arrest, whereas if they
19 violate the restraining order by
20 committing an assault, a criminal
21 trespass, criminal mischief, stalking, or
22 other criminal act, there would be that
23 immediate law enforcement remedy
24 available.

25 So I just thought that was



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1 interesting to note.

2 JUSTICE HANTZ MARCONI: It is. It's
3 almost like dual remedies. One's
4 misdemeanor level, and the other would be
5 enforced by contempt, which may be --

6 MR. STRASBURGER: Right. And
7 obviously, there's --

8 JUSTICE HANTZ MARCONI: Right. Go
9 ahead.

10 MR. STRASBURGER: And those remedies
11 are obviously -- I think this is pointed
12 out already -- only available to parties
13 in the context of a parenting petition or
14 a divorce case.

15 But we see those routinely with
16 domestic violence issues and often
17 divorces, as the -- as those members of
18 the committee who are either in private
19 practice or are judicial officers, you
20 routinely see cases that have a domestic
21 violence petition running at the same
22 time as a parenting case or a divorce
23 case.

24 JUSTICE HANTZ MARCONI: Well, and
25 it's also interesting in the big picture.



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1 (Audio interference) awful thing to talk
2 about, but different levels of abuse,
3 perhaps needing different levels of
4 remedy.

5 When we talk about expanding the
6 definition, there are different types of
7 restraining orders. The civil stalking
8 is a narrow category of behavior. And as
9 it is now, the domestic violence statute
10 is a narrow category of behavior. It may
11 be the remedy -- just like the behaviors
12 aren't one size fits all, the remedy may
13 need to be considered on a sliding scale,
14 if you will.

15 MR. ENDRES: Under the stalking
16 statute as well, the violation of a
17 458:16 order can be charged as stalking.

18 JUSTICE HANTZ MARCONI: Depending on
19 the type of behavior, right?

20 MR. STRASBURGER: That's right. And
21 often, the underlying abuse that may not
22 constitute 173 abuse would certainly
23 serve as either a basis for a 458:16
24 restraining order or a fault grounds
25 finding in the ultimate divorce, right?



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1 We have --

2 JUSTICE HANTZ MARCONI: Right.

3 MR. STRASBURGER: -- conduct as to
4 endanger health or reason. We have
5 extreme cruelty. We have a whole bunch
6 of conduct that can fall under those
7 categories that the court can consider in
8 the context of a divorce. But that
9 doesn't necessarily -- certainly, that
10 doesn't provide the same level of
11 protection as a 173-B order.

12 JUSTICE HANTZ MARCONI: Right. And
13 it doesn't address the nondivorcing,
14 childless couple. So again, you've got a
15 category of people. Whether they're
16 still married, not divorcing, whether
17 they're in a relationship without kids,
18 you have a whole category of people who
19 may be suffering from some type of abuse,
20 exploitation, and there may be a gap in
21 the remedy.

22 MS. FREEMAN: Interestingly, the
23 stalking statute references the divorce
24 restraining order. It doesn't contain a
25 similar cite to the parenting restraining



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1 order. So that is also a minor
2 difference between the parenting and the
3 divorce restraining order.

4 JUSTICE HANTZ MARCONI: That may be
5 a result of timing, right?

6 MS. SEXTON: That's what it was,
7 yep.

8 JUSTICE HANTZ MARCONI: Yep. Do we
9 know? Are there efforts to modernize the
10 stalking statute to incorporate?

11 MS. SEXTON: No. There is a effort
12 to limit the scope of 173-B. There's a
13 hearing, actually, next Friday at 10:30
14 a.m. I think the bill is House Bill
15 1340, if I'm correct. But I can send
16 that along to the group to look at.

17 JUSTICE HANTZ MARCONI: And that
18 just gets to, I know, particularly
19 Amanda. Maybe some others have followed
20 sort of legislative efforts over the
21 years. Has there been an ebb and flow?
22 Have there been initiatives that have
23 been considered and rejected? I mean,
24 just a thumbnail. Probably, you could --

25 MS. SEXTON: Yeah.



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1 JUSTICE HANTZ MARCONI: -- stay on
2 this for three hours, but --

3 MS. SEXTON: Sure. I think that the
4 thumbnail is that there has not been a
5 recent attempt to overhaul either 633:3-a
6 or 173-B.

7 JUSTICE HANTZ MARCONI: Okay.

8 JUDGE YAZINSKI: Amanda, as a
9 coalition, as a group, do you have any
10 working documents on how you would like
11 to see the definition changed?

12 MS. SEXTON: I'll be honest. We
13 have a wish list that's about --

14 JUDGE YAZINSKI: Please be honest.
15 That's --

16 MS. SEXTON: Yeah. Like, it's about
17 twenty years old. But I will say we do
18 not have an in-depth draft for a
19 definitional change because there has not
20 been a legislative environment that would
21 sort of put us in a position where we
22 feel that we could advance any sort of
23 that goal.

24 I think it's always a challenge when
25 you open up these statutes, in terms of



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1 the outcome that you might end up with is
2 not one that you might intend. There
3 could be some significant losses in terms
4 of protection. So there has not been an
5 attempt by the Coalition to make any
6 changes since the passage, in 2014, of
7 Joshua's Law, which was largely driven by
8 the need to align our statute with
9 federal law, largely for the purposes of
10 firearms, firearm reasons, so --

11 MS. BEEBE: This is Kathy Beebe. I
12 will add to that, though, I think that
13 there's a lot of base support for the
14 expansion of the definition, based on
15 what we're seeing on a (indiscernible)
16 basis.

17 JUSTICE HANTZ MARCONI: You're a
18 little better but not a lot.

19 MS. BEEBE: Tested it earlier, and
20 they said they could hear me. Is it
21 better now?

22 JUSTICE HANTZ MARCONI: Slightly.

23 MS. BEEBE: I'll talk really loud.

24 JUSTICE HANTZ MARCONI: Yes.

25 MS. BEEBE: I was saying that we're



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1 seeing a lot of big cases where -- that
2 would support the expansion of the
3 definition.

4 As Scott was saying earlier, we are
5 hearing from the abusers that are
6 recognizing their lack of physical
7 behavior that's existed in the past and
8 know that they abused long enough ago
9 that it's not -- that it is going to have
10 an impact in showing that current
11 physical danger for the victim, and then
12 using that afterwards, with all of the
13 other controlling behavior, to say, can't
14 even get this; not -- no one, not even
15 the courts are believing you in terms of
16 what's happened, and that continued cycle
17 of abuse because what we know and what we
18 see is, most of the times, it does not
19 rise to the level of the physical.

20 It might initially, and so then the
21 victim knows, every single time there is
22 that look or that threat given, what that
23 means, without there having to be the
24 physical, and then not having the
25 protections in place for all of the other



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1 psychological and emotional abuse that's
2 happening, particularly with the
3 financial abuse that's keeping them tied
4 to the abuser.

5 So there does have to be something
6 around expansion of the definitions.
7 Otherwise, so many of the victims that
8 are experiencing that nonphysical, that
9 they know the threat is still there that
10 they just can't prove, are not getting
11 the protection that they need.

12 JUSTICE HANTZ MARCONI: That sounds
13 to me like a variant, in a way, of
14 criminal threatening. There's a basis in
15 the past so that the victim knows what
16 the abuser's capable of. And so the
17 threat carries almost more weight, if you
18 will, even though the prior behavior was
19 sometime in the past. So maybe baby
20 steps, small changes just to include that
21 scenario.

22 MS. JASINA: We're also seeing --
23 along the lines of what Kathy is saying,
24 we're also seeing an increase of abusers
25 using the threat or attempted threat of



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1 suicide to control and coerce their
2 victims. And we're seeing various
3 varying orders handling the threat or
4 attempted suicide.

5 Some are recognizing it as a form of
6 abuse. Other courts are not and are not
7 including it in the determination for a
8 finding of abuse. So I think that's
9 something that we need to explore as a
10 group and how we can -- when we're
11 talking about possibly expanding the
12 definition of abuse or domestic violence
13 in New Hampshire, that's something that
14 we should consider, as we're definitely
15 seeing that as a recent trend.

16 DR. HAMPTON: One of the advantages,
17 I think, that we have in being able to
18 expand this is that there's a significant
19 scientific base where people who have
20 developed these dangerous assessment
21 tools can give us statistics and say,
22 okay, a woman who's been forced to have
23 sex against her will, whose partner has
24 abused her, is 7.6 times more likely to
25 die than someone else, which I think is



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1 useful for a couple reasons.

2 One is we can use that to help to --
3 as a solid rationale for including these
4 as risk factors, whether it's either in
5 terms of abuse or in terms of credible
6 threat.

7 The other advantage, I think, is
8 that this can also be -- which I'd love
9 to see be part of a conversation that the
10 bench is having with survivors coming in:
11 one of the reasons that I'm granting this
12 protective order is that we know that
13 people in your situation are more likely
14 to die, and can even cite the statistics
15 to back it up. I think that would be a
16 very powerful message for survivors.

17 But just to go back to the suicide
18 piece, some of these are
19 counterintuitive. One of the things that
20 we know is that if an -- this is going to
21 sound strange, but if an abuser threatens
22 to kill his partner, she's obviously at
23 greater risk of dying. If he does not
24 threaten to kill his partner but
25 threatens to kill himself instead, she's



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1 actually a greater risk of dying than if
2 he had threatened homicide. Seems to
3 make no sense whatsoever.

4 You would think shortest distance
5 from point A to B, a direct threat. But
6 what happens is the psychology is that if
7 the abuser is willing to give up
8 everything and to cash in his chips and
9 commit suicide, there is very little
10 deterrent out there that's going to stop
11 him from killing his partner. And if
12 he's going to kill himself because he's
13 losing her, he's not about to leave her
14 for someone else.

15 The point is that there's a lot of
16 these risk factors that you really have
17 to do a deep dive in to understand what
18 the psychology is and why they're -- that
19 they pose such a risk. And I hope we
20 have a -- sort of an expanded
21 conversation, as we think about expanding
22 either the abuse in 173-B or expanding
23 the criteria we use in courts for
24 establishing credible threat.

25 MS. LAFRANCE: As we talk about



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1 expanding the definition, I'm going to
2 throw on my defense attorney hat for a
3 second because I think it's important to
4 get that perspective too, because I have
5 represented individuals who have been --
6 had restraining orders taken out against
7 them by a vindictive -- it was absolutely
8 wrong for them to have a restraining
9 order taken out.

10 What concerns me is that when we
11 expand the definition, as Scott was just
12 saying about threats of suicide, then it
13 becomes, okay, how -- and I guess my
14 point is that we need to make it clear.
15 Is this a threat of suicide to control
16 the other individual, or is it really a
17 threat of suicide, just looking for help?
18 And I'm an attorney, not a psychiatrist
19 or a psychologist. So maybe Scott can
20 have some insight into that.

21 But I'm just -- I'm concerned if we
22 expand the definition into interpreting
23 people's thoughts. It's one thing to
24 say, listen, we have an individual who
25 shot somebody with no provocation, and



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1 it's pretty clear that the victim was
2 injured and that that's -- she needs a
3 protective order, but another thing to
4 say, we have this individual who
5 threatened suicide, and the victim's
6 saying, well, that made me feel -- I feel
7 like my life is in danger.

8 You know what I'm saying? I just --
9 I want to make sure that everybody on
10 this task force is aware that we need to
11 be really careful when we expand these
12 definitions because we need to prepare
13 for the fact that there are people -- and
14 it's a small, small percentage, but there
15 are people who misuse these statutes.
16 And when you start getting into people's
17 thoughts is when you open up all -- you
18 can open up a can of worms.

19 JUSTICE HANTZ MARCONI: Well, and I
20 would also say -- and Judge Yazinski
21 might jump in, but the other thing is
22 implementing the statute to the point
23 where there is a lot of data, right, but
24 it has to sort of fall into some kind of
25 objective, fair analysis process.



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1 DR. HAMPTON: Um-hum.

2 JUSTICE HANTZ MARCONI: Otherwise,
3 it's unworkable, right? So that is, I
4 think, the -- that will be the
5 difficulty, not that it can't be done.
6 That's what we're here to do is what
7 makes sense. And again, that's where you
8 get to we aren't the policymakers.

9 But that's where you have to weigh
10 the behavior, how to control the
11 behavior, how not to overcontrol the
12 behavior, and then how does it get
13 managed in a court process with two sides
14 presenting evidence and a neutral fact-
15 finder.

16 DR. HAMPTON: I think one of the
17 things that we have a precedent for this
18 in law enforcement, in terms of this idea
19 of looking at the context, what does the
20 behavior mean, and the precedent is the
21 predominant aggressor analysis.

22 So it used to be the officer would
23 show up, and whoever had scratches on
24 their face therefore was the victim, and
25 the other person was the perpetrator.



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1 And what we said is, no, we -- you need
2 to look at the context; what is the
3 meaning of what's going on. Is the
4 person using an act of violence in self-
5 defense, to resist someone else's abuse,
6 or as an instrumental act to control the
7 other person?

8 So I think we do that. We look at
9 the larger picture. What does suicide
10 mean? Is this person threatening suicide
11 at the moment the other person filed for
12 divorce, said, if you leave me, I will
13 kill myself? Now we start to get a sense
14 of what the meaning of that is, rather
15 than, no, I've been depressed for years,
16 and I'm having a mental health crisis.
17 Very different story.

18 So I think we can do that, and I
19 think we've started to look at that in
20 some other areas as well.

21 JUDGE YAZINSKI: And as a practical
22 point --

23 MS. SCHOLLETT: I think what the --
24 this is --

25 JUDGE YAZINSKI: We -- I'm sorry.



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1 Go ahead, Lyn.

2 MS. SCHOLLETT: Sorry. Hi. Lyn
3 Schollett from the Coalition. I think
4 just thinking about the context of this
5 conversation, and there seems to be a
6 shared understanding that the nature of
7 the abuse that we're all seeing is much
8 broader than maybe the black-letter law.

9 We do have some practical
10 limitations in terms of our legislature
11 right now, but I think we also need to
12 see what happens on the other end of this
13 process, which is what happens when the
14 court orders come out, because what we're
15 actually seeing is a narrowing in terms
16 of the relief that's being require -- or
17 the relief that's being awarded or what
18 the victim has to prove.

19 So for example, we've had several
20 conversations today about victims proving
21 a credible threat. But when we're seeing
22 opinions, where judges are looking for
23 very recent threats, very specific
24 threats, physical threats, that is
25 actually narrowing the definition there.



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1 So I think we need to look at both
2 ends, both the statutory component up
3 front, but we really need to have some
4 practical conversations about where that
5 expansion's happening and really making
6 it harder and harder for victims to prove
7 what they need to prove to get the relief
8 they need.

9 MR. VICINANZO: Just --

10 MR. ENDRES: Well, then when we talk
11 about expand --

12 MR. VICINANZO: Go ahead, Steve.

13 MR. ENDRES: I'm sorry. When we
14 talk about expanding definitions, the
15 definitions are essentially included in
16 two places. There's a definition in the
17 statute, and then there's a definition as
18 interpreted by the New Hampshire Supreme
19 Court.

20 And the definition in the statute is
21 made somewhat near a federal definition.
22 But it's the New Hampshire Supreme
23 Court's interpretation that's -- that I
24 think Circuit Court judges are seeing as
25 limiting that scope.



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1 And the difficulty is that the New
2 Hampshire Supreme Court isn't going to do
3 independent fact-finding and say, we --
4 this is happening; this is happening;
5 this is happening. That information
6 needs to be presented to them by one of
7 the parties of the appeal. And it seems
8 like that, perhaps, is what's missing.

9 JUDGE YAZINSKI: I'm curious, Lyn.
10 Do you have any actual statistics, other
11 than anecdotes, that support your last
12 statement that judges are narrowing it?
13 Where? When? How often? Who? To
14 simply throw out what I see as an
15 anecdotal bomb that judges are narrowing
16 the law is somewhat offensive.

17 So if they're implied, if it's
18 backed by some level of statistical
19 information, as opposed to anecdotal
20 information, sharing that would be
21 inordinately helpful to me and this
22 group.

23 MS. SCHOLLETT: Well, I appreciate
24 your question, Judge Yazinski, and I
25 certainly didn't mean to be offensive to



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1 any members of the bar who are here.

2 I don't know that we have, like,
3 numbers of cases, but we certainly see
4 opinions where the courts find that there
5 was no physical threat or there was no
6 ongoing threat or that the threat wasn't
7 recent enough. So we certainly have
8 orders that reflect that language.

9 And we have compiled a lot of orders
10 from victims who have come to us and been
11 dissatisfied with what has come out of
12 the courts. So it's very much based in
13 facts. Off the top of my head, I can't
14 tell you how many. But we do see that
15 language appearing many places.

16 And I'm just using the example of
17 the relief language in B:5 as one
18 example, where what we see the judges
19 laying over the statutory language is
20 something more narrowing. And we can
21 certainly provide those to the task
22 force.

23 JUSTICE HANTZ MARCONI: And
24 certainly, in your Dropbox, we have --
25 what we have collected are the reported



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1 and the nonprecedential orders. My
2 review of them -- and I don't have all
3 the Circuit Court orders that you may be
4 looking at. My review of those,
5 initially at least, to me it's been
6 fairly consistent for about twenty years.
7 So those are -- that's at our level
8 because I was looking at this, whether
9 anything's changed.

10 And my initial review is not much
11 has changed for twenty years, and no one
12 has -- I've only been here for four, but
13 it has not been raised in the appeals
14 that I've seen since I've been here, or
15 again, my review of those orders, that
16 anything's changed.

17 So I don't know -- again, I haven't
18 done a thorough review of Circuit Court
19 orders. But I don't know whether -- I
20 don't know whether it's taking sort of
21 something from something the Supreme
22 Court said or, like, whether it's a
23 thing, a very articulate way to conclude.

24 JUDGE YAZINSKI: If I could add one
25 more thing while we're talking --



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1 JUSTICE HANTZ MARCONI:

2 (Indiscernible) the whole -- the recency
3 issue and the physical abuse issue has
4 been out there, like I said, for about
5 twenty years. So if that is a -- if that
6 is a hot-button issue, then I don't see
7 that there's been any change. Maybe the
8 sentence has changed, and maybe our lens
9 has changed, but the law hasn't changed.

10 JUDGE YAZINSKI: I think you're
11 right, Justice Marconi. The one thought
12 that I have had about this portion of
13 decision-making and order-making -- and
14 Sarah, maybe you can chime in and provide
15 some insight or guidance -- we have
16 burden-shifting statutes in a number of
17 areas.

18 And whether it's a parental fitness
19 hearing, a guardianship hearing,
20 relocation hearing, I often wondered if
21 we were to make the initial finding that
22 there was abuse, are there any states,
23 Sarah, that you know of that then shift
24 the burden to the defendant to show that
25 they are not a threat?



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1 MS. FREEMAN: I'm not aware of any,
2 but I don't -- I'm not saying that there
3 are not. That is a really interesting
4 idea.

5 One additional point I will make, it
6 appears, in our review of some of the
7 appellate decisions that have come out,
8 that a number or if not most of those
9 appeals have come from defendants
10 appealing orders against them. They have
11 not come from petitioners who have been
12 denied orders of protection.

13 So I wonder if there is a lack of
14 resource for attorneys providing
15 appellate work. That's something, if
16 we're talking about resources,
17 advocate -- more advocate, more
18 resources, more lawyer resources, but
19 that may be another gap in the system,
20 that there are not appellate attorneys
21 who are taking cases on behalf of victims
22 or petitioners who haven't received
23 orders of protection

24 JUSTICE HANTZ MARCONI: Right. And
25 it may skew the review of those appellate



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1 decisions in that they're being raised in
2 a limited group of circumstances.

3 MR. VICINANZO: Can I just reiterate
4 how Judge Yazinski's suggestion for a
5 rebuttable presumption really, really
6 appeals to me. And I'm going to -- I'd
7 like to tell a quick anecdote, a case I
8 have right now.

9 I have a young woman who's twenty-
10 one. She was molested by a neighbor at
11 age nine. And he was -- she disclosed at
12 thirteen, testified against him at
13 fourteen, and he was convicted of
14 multiple counts of aggravated felonious
15 sexual assault.

16 He went to the state prison for a
17 few years. He's now out on -- he's now
18 out. For one reason or another, the
19 court, at sentencing, did not impose any
20 kind of a restriction, no-contact order
21 or anything like that.

22 She's now twenty-one. He's out of
23 prison. He shows up at her church last
24 weekend and claims he's just worshipping.
25 And maybe he is. I don't know. But the



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1 fact is it has really freaked her out
2 that her abuser, who is -- who the state
3 recognizes assaulted her as a child, is a
4 few hundred feet away from her or a
5 hundred feet away from her in church.

6 And she's come to me. And now I'm
7 telling her, well, it was -- you're
8 twenty-one. This occurred when you're
9 nine years old, twelve years ago. And
10 I'm reading the case law. I'm not sure
11 you qualify for a restraining order or
12 any kind of no-contact order.

13 But it seems to me somebody who
14 is -- has multiple convictions of
15 assaulting a child should be -- should
16 have the burden placed on them as to why
17 they are no longer a threat to their
18 victim. I love that idea, and I'd
19 really -- I really want to highlight it,
20 underscore it.

21 It seems to me we have it in other
22 areas of the law, like with -- where a
23 child is conceived because of a sexual
24 assault. The law now creates a rebuttal
25 presumption that those parental rights



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1 will be terminated. There be rare
2 circumstances where somebody could meet
3 that burden, maybe a Romeo and Juliet
4 type situation.

5 But it works in other parts of the
6 law. It seems to me this might be a
7 really good area and a good fit for that
8 suggestion.

9 JUSTICE HANTZ MARCONI: Well, and
10 the other thing -- maybe Steve or
11 Marcie -- where'd Steve go? Someone
12 could -- and maybe you know, David, but
13 someone does their time like that. Is
14 there any jurisdiction to continue any
15 kind of restraint? (Indiscernible)
16 assume too.

17 MS. LAFRANCE: Yeah. I mean, well,
18 they have to register as a sex offender,
19 right? So --

20 JUSTICE HANTZ MARCONI: Right.

21 MS. LAFRANCE: -- I mean, there's --

22 JUSTICE HANTZ MARCONI: But is
23 there -- can there be a -- I mean, like a
24 bail condition, which we know aren't
25 always -- I mean, I've been in that



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1 situation where it's like, you don't need
2 a restraining order; there's a bail
3 condition. But the bail condition can go
4 away. So you still need --

5 MR. ENDRES: Yeah.

6 JUSTICE HANTZ MARCONI: -- to get
7 the restraining order. But after someone
8 convicted does their time, is there the
9 ability to continue that restraint?

10 MS. HORNICK: I think, currently --
11 and I think, Steve, you might have been
12 about to say this, but I think State v.
13 Towle, right, T-O-W-L-E --

14 JUSTICE HANTZ MARCONI: Yeah.

15 MS. HORNICK: -- addressed that
16 issue. And so I think the short answer
17 is no.

18 JUSTICE HANTZ MARCONI: That's what
19 I thought.

20 MR. ENDRES: Yeah.

21 JUSTICE HANTZ MARCONI: Yep.

22 INV. BERNIER: Kristyn Bernier,
23 Belknap County Attorney's Office
24 investigator.

25 With regard to no-contact orders, on



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1 sentencing decisions, one of the things
2 that I found extremely frustrating, as
3 have a number of prosecutors and other
4 colleagues of mine, it's wonderful when
5 there is a no-contact order on a sentence
6 order. However, those are not
7 enforceable immediately by law
8 enforcement, not covered under twelve-
9 hour rule.

10 We can't arrest on that. It has to
11 be a contempt of court. Or if the
12 person's on probation or parole, it might
13 go as a violation, but there's no
14 immediate relief for a victim unless that
15 contact fits into some crime, burglary or
16 a course of conduct stalking.

17 And one of the things that a number
18 of us have talked about -- I've talked
19 about it with Amanda on a number of
20 occasions -- is whether or not that no-
21 contact order for a domestic violence
22 victim, a sexual assault victim, a child
23 victim, could be made into an order that
24 is covered under 173-B so that it is
25 immediately -- it can be immediately



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1 addressed by law enforcement and not be
2 in the hands of somebody to get a hold of
3 a prosecutor to file a contempt for a
4 contempt hearing.

5 JUSTICE HANTZ MARCONI: Interesting.

6 MS. BEAUCHAMP: This is Merrill from
7 the Victim Witness Program at the
8 Hillsborough County Attorney's Office.

9 Just to kind of piggyback on that,
10 it's often occurred to me too,
11 particularly in cases where we have a
12 criminal bail protective order that's
13 issued and (audio interference) during
14 the pendency of the case, if at upon
15 resolution of the case, if there were a
16 way to have sentencing judge perhaps have
17 some ability to convert that criminal
18 bail protective order, rather than have
19 it completely disappear, that it turned
20 into an actual protective order that
21 mirrors what's in the sentence.

22 It would be great if there were a
23 suspended sentence for ten years. I
24 think it would be fantastic if there were
25 a protective order in place for that



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1 length of time.

2 As Kristyn said, it's not just
3 contempt of a court order that is not
4 actionable the moment the contact
5 happened. Just a thought.

6 MS. LAFRANCE: Just to jump on that
7 for a second, I think you might have a
8 equal protection argument because you're
9 treating them differently than other
10 people who have committed crimes, and you
11 have protective orders issued against
12 them.

13 I mean, if you take a domestic
14 violence case of assault, then they get a
15 protective order. They get it extended a
16 year and then maybe subsequently after
17 that. But if you put a blanket
18 protective order in place for ten years
19 or twenty years, however long the
20 sentence is suspended, I think you might
21 have an equal protection argument.

22 And I don't know if the attorneys
23 want to jump in on what their thoughts on
24 that, but --

25 JUSTICE HANTZ MARCONI: Interesting



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1 point. It is (audio interference).

2 That's why it is a bit of a balancing
3 act.

4 MS. BEAUCHAMP: Even if it were put
5 in place, the CBPO were turned into a
6 one-year order, and there was then the
7 victim would have to seek a renewal of
8 that order afterwards. I just think it
9 would be a lot easier on victims. I
10 think it's very, very difficult.

11 I mean, we try to do the LAP
12 screens, the police do, as the -- right
13 after the incident has occurred. That
14 can be a difficult thing for a victim to
15 even answer those questions. If an
16 emergency telephonic order is offered to
17 someone, again, right at the scene of a
18 crime, perhaps, just happened, that might
19 not be something that they can follow
20 through on the next day, when they have
21 to go and get the order.

22 But when they have -- when they're
23 given a criminal bail protective order by
24 the court and an advocate gets that into
25 their hands right away, we're explaining



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1 to them that that is really a protective
2 order for them and that if defendant
3 violates it while it's in place, it's
4 actionable; it's immediately actionable,
5 arrestable new charges.

6 And victims feel a lot of relief,
7 and they don't have to go through a
8 second process to go by themselves to
9 court, with or without an advocate to
10 help them, and be subject to cross-
11 examination by an offender's attorney,
12 then that hearing and if probation and
13 what they've written in a petition -- we
14 all know. We've seen it in (audio
15 interference), but that's also something
16 that (audio interference) to a criminal
17 case and cause issues.

18 And so I think it would be great if
19 victims didn't have to go through a
20 process twice. If there's a criminal
21 bail protective order and there's a way
22 to keep that in place for them after the
23 case is resolved, after maybe they've
24 gone through testifying and all of that,
25 and not put them in a place where they've



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1 got to go back to court and face the
2 offender again, I think that would be
3 helpful.

4 JUSTICE HANTZ MARCONI: I think
5 that's a good suggestion in that I think
6 part of what this task force is looking
7 at is trying to coordinate the various
8 moving parts in a particular case. And
9 we've identified a gap where if there is
10 a way to streamline, coordinate, share,
11 consolidate, that might make sense.

12 MS. LAFRANCE: Can I just throw this
13 out there? What Merrill just said is
14 you're presuming that this person is
15 found guilty.

16 JUSTICE HANTZ MARCONI: Right.

17 MS. LAFRANCE: So what happens --
18 and it happens -- a person goes to trial;
19 they're found not guilty?

20 JUSTICE HANTZ MARCONI: Right.

21 MS. LAFRANCE: There's no more
22 CBPO. There's no sentence.

23 JUSTICE HANTZ MARCONI: Yet they may
24 still -- they may still be subject to a
25 restraining order in a separate



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1 proceeding.

2 MS. LAFRANCE: Right.

3 JUSTICE HANTZ MARCONI: Yeah.

4 MS. LAFRANCE: That might be the
5 victim's only recourse.

6 JUSTICE HANTZ MARCONI: Right.

7 INV. BERNIER: With regard to the
8 criminal bail order of protection, this
9 has come up a lot over the last couple of
10 years. All of our understanding was that
11 the CBPO was put into place so that the
12 victim did not have to go through the
13 civil process, testify, go through
14 hearings in a separate venue when a
15 criminal case is ongoing.

16 However, what we are finding is that
17 with the more egregious offenders who are
18 being placed on preventative detention
19 for child exploitation, sexual assault,
20 domestic violence-related felony-level
21 crimes, we have defense attorneys who are
22 arguing that because the individual is
23 not out on bail, that the CBPO is not
24 enforceable by law enforcement.

25 I always charge it. I don't care.



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1 We'll take it to trial. But there is a
2 school of thought where there are some
3 defense attorneys that are going in and
4 arguing that in courts. Some of the
5 newer judges are buying that. Some
6 prosecutors are leery about enforcing it.

7 And the behavior that we're seeing
8 from inside jails, phone calls, third-
9 party contacts, witness tampering,
10 particularly when there are children
11 involved, letters -- I just arrested on a
12 case involving 300 pages of letters sent
13 on a marital rape case from the defendant
14 in the jail.

15 Part of that had to do with he felt
16 that he could reach out to his one-year-
17 old child via letter, because apparently,
18 she can read. And he thought that was a
19 loophole.

20 But we're seeing a lot of -- I have
21 a number of these cases right now. And
22 everybody that I've spoken to has had a
23 real frustration with the lack of
24 clarification that we're getting on that.

25 Again, our understanding is it's not



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1 a condition of bail. It is a -- it is a
2 no-contact order, whether you're in
3 Timbuktu, at home, or in the House of
4 Corrections.

5 We're also seeing that in some
6 places, they're having -- they're able to
7 get into social media incarcerated, so
8 that's another issue. That's just as
9 problematic, plus it opens the door. I
10 think I called it the Petri dish of
11 witness tampering. It causes a lot of
12 problems.

13 And that clarification, I think,
14 would be really helpful for those of us
15 charging and trying to enforce those
16 orders.

17 JUSTICE HANTZ MARCONI: Excellent
18 input.

19 MS. JASINA: And we're always trying
20 to encourage people -- I completely
21 understand not wanting a victim to have
22 to testify or give their story multiple
23 times. We're always encouraging, when
24 there is a CBPO in place, that they also
25 go through the civil process, if that's



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1 something that they want, because it goes
2 beyond the no-contact order.

3 There is the no-contact provision
4 under 173-B, but it's that other relief
5 that can financially stabilize a victim,
6 so ordering child support payments,
7 ordering payment of rent or utilities,
8 mortgage payments, visitation in some
9 cases.

10 So I understand trying to limit the
11 process as a whole. But there are some
12 things that can happen in the -- on the
13 civil side of things that are not able to
14 happen on the criminal side of things
15 that I think are really important for a
16 victim to be able to access. It's
17 important for them to have both.

18 INV. BERNIER: Which is fine.
19 However, we have to remember that these
20 things were designed so that a victim
21 could go in without having to bring in
22 counsel. And we can't guarantee that
23 there is advocacy.

24 What ends up happening with a
25 criminal proceeding is that the defense



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1 attorney will show up at the restraining
2 order hearing with their client. So now
3 you have your victim being cross-
4 examined, and it becomes, potentially, a
5 trial, all of it being exculpatory.

6 So if there is any type of problem
7 with that victim's testimony, you've now
8 potentially tanked a criminal case
9 because they shouldn't be conjoined.

10 Years ago, if we had a criminal case
11 ongoing and a victim went in and filed
12 for a civil restraining order, judges
13 would authorize that temporary order,
14 which is good for up to a year, but they
15 would not hold a final hearing. They
16 would basically not make an order, so as
17 not to bias one side or the other, not
18 have the hearing. That temporary order
19 would go into place pending the outcome
20 of the criminal case.

21 When that started changing, I don't
22 know. But it was one of the things that
23 we always used to go in. Advocacy would
24 also do the same thing. And judges would
25 just basically place it on file and keep



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1 it open as a temporary order so that you
2 didn't end up with a victim going in and
3 having a free-for-all with a defense
4 attorney asking a lot of questions and
5 causing potential problems for the
6 criminal case.

7 MS. JASINA: Yeah, and what we're
8 seeing as a tactic in -- if that system
9 were still in place, and sometimes it's
10 something similar to that is happening
11 with defense attorneys requesting
12 multiple continuances while there is a
13 criminal case ongoing, so it extends out
14 the civil case, which then creates an
15 issue with the credible present threat
16 argument.

17 So six months have gone by. A year
18 has gone by. The temporary order has
19 still been in effect. Nothing has
20 happened. So then the -- is there a
21 credible present threat anymore? And
22 we've seen cases tossed out because of
23 that very reason that the temporary order
24 has been extended due to the criminal
25 case, and then when it come -- when the



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1 criminal case is resolved, then it comes
2 back to the 173-B protective order case.

3 And then there's this argument that
4 there's no more credible present threat.
5 And --

6 JUSTICE HANTZ MARCONI: I'd be
7 curious -- I'd be curious on that point.
8 And we'll wrap up shortly, but I'd be
9 curious on that point because I am not
10 familiar with if a protective order is in
11 place and nothing's happened. That means
12 a protective order is in place, and
13 nothing's happened.

14 So I'd be curious if the duration of
15 a protective order somehow equates to
16 there not being a present credible
17 threat. You know what I'm saying?

18 So I'd be curious in some more data
19 on that point, if you will, because I
20 (audio interference) this recent
21 discussion, I take that one area of
22 inquiry, perhaps, is looking at the --
23 again, the interrelation of these
24 criminal restraining orders, the time
25 frame, the scope and process, but also



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1 how that relates to the civil process,
2 because I agree the civil process is
3 broader, provides (audio interference)
4 relief, although limited in time.

5 So that, I think, is a takeaway from
6 this discussion, so --

7 MS. HORNICK: I just want to lump
8 on --

9 JUDGE YAZINSKI: And if I could
10 (indiscernible) --

11 MS. HORNICK: -- or add on, sort of
12 pile on one last thing, if I may, and I
13 apologize. This is, again, from the
14 criminal realm perspective, and I'll keep
15 it very brief.

16 But as we're talking about it,
17 another tool or tactic that we've been
18 seeing lately by the criminal defense bar
19 is to claim that the victim has Richards
20 issues so therefore needs an attorney to
21 perhaps not allow her to actually speak
22 as to what happened in her abuse or with
23 her abuse and has somewhat successfully
24 prevented criminal cases from going
25 forward.



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1 So I just -- I add that at the end,
2 since we got talking about that
3 intersection of criminal cases and civil
4 cases. Thank you.

5 JUDGE YAZINSKI: If we could add one
6 last thing in regard to this, I get those
7 motions asking for the extension of a
8 temporary hearing. And I have ruled and
9 will continue to rule that the thirty-day
10 requirement in RSA 173-B can't be changed
11 by agreement of the parties, and I won't
12 extend the temporary order. So we have
13 the final hearing.

14 It becomes difficult for all the
15 reasons, Erin, that you have outlined.
16 You keep continuing a temporary hearing
17 or allow that to go for a year, not only
18 does the argument get raised that there's
19 no longer a present threat, but
20 oftentimes, the people who were around
21 and involved at the time and involved
22 with the parties are gone, so witnesses
23 are gone.

24 But I think the thirty-day, if --
25 and maybe the Supreme Court ultimately



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1 will decide this, because I know other
2 judges disagree with my position -- I
3 think thirty days means thirty days; the
4 statute's clear that the final hearing
5 shall occur within thirty days -- to
6 bring finality to these issues.

7 MR. STRASBURGER: And can I just add
8 one last thing to what Judge Yazinski
9 just said, because I have seen judges go
10 both ways. I've seen judges who have
11 granted a continuance because there's a
12 pending criminal matter. They want to
13 give the defendant a meaningful
14 opportunity to participate in the crim --
15 excuse me, in both the civil and criminal
16 case, understanding that there is a right
17 against self-incrimination.

18 So the lack of uniformity there is
19 tough to navigate because it's very tough
20 to figure out whether or not you're going
21 to have to be prepared to go forward or
22 not.

23 But I just wanted to comment, more
24 specifically, on -- I think it was Ms.
25 Bernier's comment about having the CBPO



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1 sort of turned into a protective order
2 without an opportunity to have defense
3 counsel question.

4 I think that we're forgetting that
5 if you're a defendant who is subject to
6 criminal charges and you're also the
7 respondent in a DVP, right, in the civil
8 case, the domestic violence petition,
9 although the defendant doesn't have to
10 testify and can certainly rely on their
11 right to remain silent and choose to not
12 participate, in the DVP context, the
13 court can draw an inference from that,
14 right?

15 The court can say, they didn't
16 defend. They didn't put on a defense.
17 They didn't participate. This is a civil
18 remedy, and I can draw an inference from
19 that. And I think that -- so defendants
20 are in a particularly precarious spot.

21 And I do -- I represent both victims
22 in these cases and defendants, doing a
23 lot of family law work, because DVPs get
24 brought frequently. And I also have
25 clients who have accompanying criminal



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1 charges.

2 And it's a real serious discussion
3 when you have to go in for a domestic
4 violence petition hearing, which needs to
5 be held within thirty days, there have
6 been no temporary orders regarding
7 parenting in the divorce case or
8 parenting case heard, and oftentimes, as
9 we see, I think probably 99.9 percent of
10 the time, when a judge issues a temporary
11 order of protection, parenting time is
12 denied pending further hearing, pending a
13 final hearing on the DVP.

14 So it's important to understand that
15 there's a due process obligation, I
16 think, that we have here. And a
17 defendant may really be risking a lot by
18 choosing to participate in their civil
19 case, in their DVP, and taking that stand
20 and testifying in their own defense, even
21 though they're in the infancy stages of a
22 criminal prosecution.

23 So I think while, sure, it may be
24 easy to argue that just convert a
25 criminal bail order of protection to a



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1 final protective order and that may make
2 it easier for victims, I think we're
3 forgetting about how difficult it may be
4 for a criminal defendant to participate
5 in this process at all, right, if they
6 are subject to criminal prosecution at
7 the same time, which I think is
8 significant.

9 And they may be faced with a choice
10 of you're in Judge Yazinski's court. I
11 would have to have a very serious
12 conversation with my client about, look,
13 we're going to have every opportunity to
14 cross-examine the petitioner and any of
15 the petitioner's witnesses, but you're
16 going to have to choose as to whether or
17 not you want to testify, because your
18 criminal case is just starting.

19 But I think to preclude the process
20 of allowing a defendant or a respondent
21 in a DVP to confront the allegations
22 against them would be pretty inconsistent
23 with our system.

24 JUSTICE HANTZ MARCONI: Right. And
25 there's a timing issue, and I will only



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1 raise because I think it came through in
2 some of the information that I've been
3 amassing. You also end up with that
4 order from the domestic violence case is
5 now out there, whatever the findings are,
6 that then if there is a analog (ph.)
7 criminal case, both sides have to deal
8 with whatever the findings are in the
9 domestic violence order.

10 MR. STRASBURGER: Right, which has a
11 long-lasting effect in the family law
12 arena. I can tell you that for sure --

13 JUSTICE HANTZ MARCONI: Correct.

14 MR. STRASBURGER: -- irrespective of
15 what happens in the separate criminal
16 case.

17 JUSTICE HANTZ MARCONI: Right. So
18 that's the intersection of all those
19 factors.

20 So we are at our break point, unless
21 there is any further discussion. And
22 frankly, if this has triggered more
23 ideas -- I think we've gotten some good
24 ones, actually, which we are in the
25 process -- and not to overload you with



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1 paper, but we're summarizing yesterday's.

2 We're going to be summarizing today's.

3 We're going to circulate those

4 summaries so that you can pick up

5 whatever we have lost track of, because I

6 want to keep a record of all of these

7 ideas. And feel free, if something has

8 triggered after we close today, to send

9 an email to -- a message, a something to

10 Lisa or Anne, and we can upload it to the

11 Dropbox, circulate it to everyone.

12 Circulate it yourself. We all have

13 the group email. So feel free to

14 continue to think and contribute on

15 today's charge topics.

16 And that closes us out for today.

17 And we will be regrouping and meeting

18 again next week. And you have your

19 homework to do. And next week, I think,

20 is Judge Yazinski's form review

21 assignment, plus what we're dealing with

22 in the next two charges.

23 So enjoy. I really -- again, I

24 can't say enough -- appreciate the time,

25 attention, and dedication and sincerity



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1 of this group. I am quite impressed.

2 Thank you.

3 (End of audio)

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C E R T I F I C A T I O N

I, Cheryl Odom, certify that the
foregoing transcript is a true and
accurate record of the proceedings.



Cheryl Odom (CDLT-186)

TTA-Certified Digital Legal Transcriber

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New York, NY 10001

Date: March 1, 2022



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